

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**STATE EX REL. PRAXAIR, INC.,
AG PROCESSING, INC., A
COOPERATIVE, AND SEDALIA
INDUSTRIAL ENERGY USERS'
ASSOCIATION,**

**APPELLANTS;
OFFICE OF PUBLIC COUNSEL,
APPELLANT,**

v.

**MISSOURI PUBLIC SERVICE
COMMISSION, GREAT PLAINS
ENERGY, KCP&L, KCP&L GREATER
MISSOURI OPERATIONS CO., RESPONDENTS.**

DOCKET NUMBER WD71340 Consolidated With WD71396

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: August 17, 2010

Appeal From:
COLE COUNTY CIRCUIT COURT
THE HONORABLE JON EDWARD BEETEM, JUDGE

Appellate Judges:
Division One: Lisa White Hardwick, P.J., James M. Smart, Jr., and Alok Ahuja, JJ.

Attorneys:
David L. Woodsmall, Jefferson City, MO, **for appellants Praxair, Inc., AG Processing, Inc., and Sedalia Industrial Energy Users' Association;** and Christina L. Baker and Lewis R. Mills, Jr., Jefferson City, MO **for appellant Office of Public Counsel.**

Steven C. Reed and Jennifer L. Heintz, Jefferson City, MO, **for respondent Missouri Public Service Commission;** and Karl Zobrist and Roger W. Steiner, Kansas City, MO **for respondents KCP&L, Great Plains Energy, and KCP&L Greater Missouri Operations Co.**

**MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS
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Cole County

Before Division One Judges: Lisa White Hardwick, Presiding Judge, James M. Smart, Jr., and Alok Ahuja, Judges

Great Plains Energy Inc., Kansas City Power and Light, and Aquila, Inc. ("the Utilities") sought approval from the Public Service Commission of Great Plains' plan to acquire Aquila's stock and operate it as a wholly-owned subsidiary. Great Plains is the holding company of Kansas City Power and Light, operating under the brand name KCPL. The Office of Public Counsel opposed the acquisition. A consortium of industrial utility consumers, comprised of Praxair, Inc., AG Processing, Inc., A Cooperative, and Sedalia Industrial Energy Users' Association ("the Industrials") also opposed the acquisition and intervened. Following a hearing before three of the five sitting commissioners (after two commissioners recused), the Commission approved the acquisition plan by a two-to-one vote. As a result, Great Plains now also holds Aquila, which it has renamed "KCPL Greater Missouri Operations." The Office of Public Counsel and the Industrials appeal, claiming that the Commission exceeded its authority in approving the acquisition of Aquila by Great Plains.

AFFIRMED.

Division One holds:

Point one claims that the Commission erred in refusing to allow offers of proof on matters that the Commission had excluded when it granted the Utilities' motion to limit the scope of the proceedings. Because the Commission is specifically authorized to exclude evidence that it finds to be wholly irrelevant, and because the appellants do not

establish that the excluded evidence would have been relevant and adverse to allowing the merger, the Commission did not legally err or abuse its discretion in denying the offers of proof.

Point two contests the legality of the Commission's ruling in that it was approved by only two of the five sitting commissioners (less than a majority). The appellants say that a vote of the Commission must be approved by a majority of the entire Commission and not simply a majority of the quorum (even where a quorum is authorized to hear the matter). In the absence of a contrary statute, a majority of a quorum is authorized to act for an administrative body. Thus, the Commission's decision to approve the acquisition by a majority vote of the quorum was not unlawful or unreasonable.

Point three says the Commission committed reversible error in denying the Office of Public Counsel's motion to dismiss, which claimed that pre-filing meetings between commissioners and Utility executives created such an appearance of impropriety that those commissioners should have recused. The appellants do not establish that the Commissioners violated any statutory or regulatory provisions that were in effect at the time of these proceedings, nor do they demonstrate that the *ex parte* discussions impacted the result of the proceeding in any way. Thus, it cannot be said that the Commission erred in denying the motion to dismiss.

All three points are denied. The judgment is affirmed.

Opinion by: James M. Smart, Jr., Judge

August 17, 2010

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